84-985

Office - Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BILLY JOE NICHOLS,

Petitioner

VS

UNITED STATES OF AMERICA

Respondent

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

STEVE ORR
ORR & DAVIS
812 San Antonio Street
Suite 211
Austin, Texas 78701
512/474-5791

ATTORNEY OF RECORD
FOR PETITIONER
BILLY JOE NICHOLS

53

QUESTION PRESENTED FOR REVIEW

I. May the United States pursue multiple trials for different, but closely related statutory violations occurring in a single drug conspiracy without violating the double jeopardy provisions of the Fifth Amendment?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iv

The Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 9

I. WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS THE GOVERNMENT TO PURSUE MULTIPLE TRIALS FOR THE SEPARATE SUBSTANTIVE OFFENSES GROWING OUT OF A SINGLE DRUG CONSPIRACY REQUIRES DETERMINATION BY THE SUPREME COURT. 9

II. THE BLOCKBURGER RULE DOES NOT ADEQUATELY IMPLEMENT THE PROTECTION PROVIDED BY THE DOUBLE JEOPARDY CLAUSE. . 11

III. THERE IS DISAGREEMENT AMONG THE CIRCUITS IN THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE TO CASES INVOLVING MULTIPLE PROSECUTIONS FOR THE SEPARATE OFFENSES ARISING OUT OF A SINGLE COURSE OF CRIMINAL ACTIVITY. 14

IV. IN VIOLATION OF ITS OWN POLICY, THE PETITE POLICY THE GOVERNMENT HAS SOUGHT TO PROSECUTE PETITIONER IN MULTIPLE TRIALS FOR OFFENSES ARISING FROM THE SAME CRIMINAL TRANSACTION. 16

Conclusion 19

Certificate of Service 20

Appendix:

A. Opinion of the Court Below A1

B. 21 USC §952 ..... A24

C. 21 USC §963 ..... A25

D. 21 USC §841(a) (1) A26

E. 21 USC §846 ..... A27

TABLE OF AUTHORITIES

Cases:

Albernaz v. United States,

450 U.S. 333 (1981) 9

Ashe v. Swenson,

397 U.S. 346 (1970) 12

Blockburger v. United States,

284 U.S. 299 (1932) 12

Breed v. Jones,

421 U.S. 519 (1975) 17

Green v. United States,

355 U.S. 184 (1957) 17

Jeffers v. United States,

432 U.S. 137 (1977) 11

Jordan v. Virginia,

653 F.2d 870 (4th Cir. 1980) 14

Missouri v. Hunter,

459 I.S. 359 (1983) 13

Pandelli v. United States,

635 F.2d 533 (6th Cir. 1980) 15

Petite v. United States,

361 U.S. 529 (1960) 16

Rinaldi v. United States,

434 U.S. 22 (1977) 17

United States v. Bendis,

681 F.2d 561 (9th Cir. 1982) 15

United States v. Nichols,

No. 83-3511 (5th Cir. Sept. 17, 1984) 6

United States v. Tercero,

580 F.2d 312 (8th Cir. 1978) 15

Wilson v. United States,

420 U.S. 332 (1975) 12

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fifth Amendment 3

21 USC §952(a) 3

21 USC §963 3

21 USC §841(a) (1) 3

21 USC §846 3

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BILLY JOE NICHOLS,

Petitioner

VS

UNITED STATES OF AMERICA

Respondent

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

Petitioner, **BILLY JOE NICHOLS,** respectfully prays a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on September 17, 1984.

THE OPINION BELOW

The original opinion of the Court of Appeals for the Fifth Circuit was rendered on September 17, 1984. Panel Rehearing and Rehearing En Banc were denied on October 22, 1984. A copy of the Opinion is appended hereto.

JURISDICTION

Grounds on which jurisdiction of the Supreme Court is invoked:

A. The Court of Appeals for the Fifth Circuit rendered its opinion on September 17, 1984.

B. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on October 22, 1984.

C. The Supreme Court has jurisdiction by reason of 28 USC §1254(a).

QUESTION PRESENTED FOR REVIEW

I. May the United States pursue multiple trials for different, but closely related statutory violations occurring in a single drug conspiracy without

violating the douple jeopardy provisions of the Fifth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"

Title 21 USC §952(a), 963 (1970) are reprinted in pertinent part in the appendix.

Title 21 USC 841 (a) (1), 846 (1970) are reprinted in pertinent part in the appendix.

STATEMENT OF THE CASE

Billy Joe Nichols, Petitioner, was indicted in the Eastern District of Louisiana in four multi-count indictments for his alleged involvement in a long term cocaine smuggling operation. The four indictments were docketed and numbered as CR-83-166, CR-83-168, CR-83-305, and CR-83-306. In the indictment CR-83-166, dated March 25, 1983, Petitioner was charged with one count of conspiracy to import cocaine (21 USC §963, 952) and with one count

of conspiracy to possess with intent to distribute cocaine (21 USC §846, 841(a) (1)) (R. Vol. III, pp. 186-187). On August 5, 1983, after a trial before a jury Petitioner was found guilty on both counts.

In the indictment docketed as CR-83-168, dated July 8, 1983, Petitioner is charged with conspiracy to unlawfully "attempt to import and import" cocaine (21 USC §963, 952), conspiracy to "attempt to possess and to possess" with intent to distribute cocaine (21 USC §846, 841(a) (1)), and unlawful "attempt to import and import" of cocaine. (21 USC §952) No issue directly involving CR-83-168 is presented in this petition. The two indictments docketed as CR-83-305 and CR-83-306 charged Petitioner in each with one count of conspiracy to import cocaine (21 USC §963, 952), conspiracy to possess with intent to distribute cocaine (21 USC §846, 841(a) (1), importation of cocaine (21 USC §952), and possession with intent to distribute cocaine (21 USC §841(a) (1)).

In the matters docketed as CR-83-305 and CR-38-306, Petitioner filed pretrial motions to dismiss the indictments

as violative of the Double Jeopardy Clause of the Fifth Amendment because of his previous trial and conviction in CR-83-166. On August 17, 1983, the district court denied both the motion to dismiss and Defendant's motion for a stay pending an appeal of the denial of the motion to dismiss. By order of the Fifth Circuit Court of Appeals, the consolidated proceedings in CR-83-305 and CR-83-306 were stayed on August 24, 1983, pending Petitioner's appeal of the denial of his motion to dismiss. The Fifth Circuit, agreeing with Petitioner that the offenses charged in the separate indictments arose in a single conspiracy to import cocaine reversed the district court as to the conspiracy counts charged and directed dismissal of those counts in CR-83-305 and CR-83-306. However, the Fifth Circuit affirmed the district court's ruling on the substantive counts in the indictment stating,

> Under our application of Blockburger's teachings, the offenses of conspiracy to commit a crime and the crime itself are separate offenses. Each requires proof of a fact not required for the other.
>
> Nichols' conspiracy convictions provide no double jeopardy obstacle to prosecution of the pending substantive charges.

United States v. Nichols, No. 83-3511, (5th Cir. Sept. 17, 1984). On October 22, 1984, Petitioner's Petition for a Rehearing and Suggestion for a Rehearing En Banc were denied.

In 1982, Claude Griffin began a cocaine smuggling operation which would ultimately result in Petitioner's being charged in the four indictments discussed above. Claude Griffin, one of the two organizers of the cocaine smuggling conspiracy was the government's chief witness against Petitioner in the trial of CR-83-166 and scheduled to be the chief witness in the trial of CR-83-305 and CR-83-306. Fernando Lopez, a Columbian national and the other organizer of the cocaine smuggling conspiracy, is a fugitive at this time.

In June, 1982, Griffin and Lopez agreed to provide transportation necessary for smuggling large quantities of cocaine into the United States from Columbia. According to Griffin's testimony in the trial of CR-83-166, the smuggling operation as intended to be a long-term, on-going transaction involving multiple loads. Initially, Griffin

and Lopez hired James Eakes and Robert Ross, co-defendants in CR-83-305 and CR-83-306, to transport the cocaine in from Colombia. Eakes and Ross, in turn, hired Petitioner to pilot the aircraft (a Piper Aztec) transporting the cocaine into the United States.

In July, 1982, the Griffin-Lopez cocaine smuggling operation brought its first shipment of cocaine, consisting of approximately 100 kilos, into Raceland, Louisiana. In August, 1982, a second shipment of approximately 250 kilos of cocaine was flown in. After the second shipment and as a consequence of various disputes and disagreements, Griffin and Lopez decided to cut Eakes and Ross entirely out of the operation and deal directly with their own pilot. According to Griffin, one E. Lee Morris and Petitioner were then hired as pilots for the future shipments. Arrangements were made to bring in a third load of cocaine in October, 1982. However, on the way to Colombia the plane developed mechanical problems and the Griffin-Lopez group was required to use Eakes and Ross to obtain a substitute airplane and pilot. Eakes and

Ross found a pilot (Hank Thompson), but instead of bringing the load of cocaine into Raceland they apparently stole the cocaine for themselves.

During the period of time when efforts were being made to import the third shipment of cocaine, Griffin and Lopez along with Dr. Isaac Saltz (an acquaintance of Griffin's) purchased a Piper Navaho aircraft to use in bringing in future cocaine shipments. Allegedly, the Piper Navaho was to be used for a fourth load of cocaine that was planned by the Griffin-Lopez operation but never attempted. The Griffin-Lopez group's plan to import a fourth shipment of cocaine provided the substance of the indictment in CR-83-166. Rather than charge a single overall conspiracy to import separate loads of cocaine, the Government indicted each of the four discussed loads as a separate conspiracy. At Petitioner's earlier trial of CR-83-166, the Government was permitted to introduce into evidence under Federal Rules of Evidence 404(b), testimony concerning Petitioner's alleged involvement in

the activities surrounding the first three cocaine loads which gave rise to the three indictments docketed as CR-83-168, CR-83-305 and CR-83-306. The evidence the government will introduce at a trial on the charges in CR-83-305 and CR-83-306 will not differ either in scope or in substance from that introduced at the trial of CR-83-166.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS THE GOVERNMENT TO PURSUE MULTIPLE TRIALS FOR THE SEPARATE SUBSTANTIVE OFFENSES GROWING OUT OF A SINGLE DRUG CONSPIRACY REQUIRES DETERMINATION BY THE SUPREME COURT.

Albernaz v. United States, 450 U.S. 333 (1981) makes clear that multiple punishments and convictions for separate offenses arising from a single drug conspiracy are not constitutionally impermissable under the double jeopardy clause when they are sought at a single trial. This position has been recently reaffirmed by the Supreme

Court in Missouri v. Hunter, 459 U.S. 359 (1983). However, this Court has never held that it is permissable, without violating the double jeopardy clause, for the Government to seek multiple punishments and convictions at multiple trials for conduct during a single drug conspiracy which violates several penal statutes.

Conspiracies, especially drug related conspiracies, commonly involve multiple offenses. Because this Court has never squarely addressed the issue, it is at present solely within the Government's discretion to decide whether to seek multiple trials for separate offenses stemming from a single course of criminal conduct or whether to bring all of the offenses in a single trial. As Petitioner's case illustrates, unreviewed and unlimited prosecutorial discretion of this sort is especially subject to abuse. In addition to the potential for prosecutions for purpose of harrassment only, there is the clear probability that one might be acquitted at a prior trial only to be convicted at a later one for essentially the same conduct. Such an occurrence is repugnant to the very nature of

double jeopardy. To prevent the repetition of occurrences such as the Government's action in Petitioner's case there is a substantial need for this court to exercise its power to clarify the extent to which the double jeopardy clause applies to successive prosecutions of separate substantive offenses growing out of a single course of criminal activity.

II. THE BLOCKBURGER RULE DOES NOT ADEQUATELY IMPLEMENT THE PROTECTION PROVIDED BY THE DOUBLE JEOPARDY CLAUSE.

Protection against multiple prosecutions for the "same offense" is at the very core or "the heart", of the double jeopardy clause. Jeffers v. United States, 432 U.S. 137 (1977). Jeffers raised issues similar to those involved in this petition. However, this Court did not need to address these matters in that opinion because the Defendant in Jeffers opposed the Government's motion to consolidate and thereby waived his claim of double jeopardy and his protection from multiple prosecutions. 432 U.S. at 154.

The policy of avoiding multiple trial has been regarded as so important that exceptions to the principal have been

only grudgingly allowed. Wilson v. United States, 420 U.S. 332 (1975). In the interest of fairness and finality the double jeopardy clause requires that a Defendant not be on trial more than once for the same offense regardless of whether he is acquitted or convicted.

The established test in federal prosecutions for determining whether two offenses are the same for purposes of invoking double jeopardy is the "same evidence" test or "Blockburger Rule". Blockburger v. United States, 284 U.S. 299 (1932). The Blockburger Rule is adequate to afford a defendant double jeopardy protection when the constitutionality of multiple punishments is at issue. As demonstrated by Petitioner's case the Blockburger Rule provides a defendant with considerably less than adequate protection from unnecessary and abusive multiple prosecutions. Blockburger has made multiple prosecutions commonplace rather than exceptional.

This Court's decision in Ashe v. Swenson, 397 U.S. 346 (1970) recognized the inadequate scope of the double

jeopardy protection afforded by the Blockburger Rule by barring the subsequent prosecution of a defendant in circumstances in which the Blockburger Rule would have permitted it. In Missouri v. Hunter, supra, this Court reiterated its position that the Blockburger Rule is only a rule of construction, not a constitutionally required test, and consequently not the only means of determining whether the double jeopardy clause has been violated. The impending second trial of Petitioner is eloquent testimony to the need for this Court to address the gaps and inadequacies of the Blockburger Rule in affording defendant's protection from unnecessary and abusive multiple trials for the separate instances of conduct related to a single course of criminal conduct. Petitioner's retrial is especially unnecessary because the Government was fully prepared and capable of proceeding on all charges against Petitioner at a single trial. The Government's evidence at Petitioner's trial in CR-83-166 covered the entire period of the alleged drug conspiracy and all of the offenses charged in all four indictments. The Government can cite

no reasonable justification for failing to consolidate and proceed on all of the indictments in a single trial. Because of the manner in which the Government chose to indict and proceed to trial Petitioner was confronted with the possibility of four separate prosecutions for the identical criminal acts. Unless this court grants certiorari to reexamine and reevaluate the efficacy of applying the Blockburger Rule in double jeopardy cases involving multiple prosecutions, Petitioner will be required to defend against two more prosecutions involving criminal conduct for which he has already been convicted.

III. THERE IS DISAGREEMENT AMONG THE CIRCUITS IN THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE TO CASES INVOLVING MULTIPLE PROSECUTIONS FOR THE SEPARATE OFFENSES ARISING OUT OF A SINGLE COURSE OF CRIMINAL ACTIVITY.

In Jordan v. Virginia, 653 F.2d 870 (4th Cir. 1980), the Fourth Circuit Court of Appeals held that separate prosecutions for related offenses arising in a single course

of criminal conduct can violate the double jeopardy clause even though it would be permissable to prosecute all the offenses at a single setting. In arriving at its decision, the Fourth Circuit found that under the circumstances Blockburger was inadequate to protect the Defendant's double jeopardy rights. The court concluded that if the evidence presented at the earlier prosecution would have sustained the charges in the subsequent prosecution, then for double jeopardy purposes the offenses were the same.

At this time only the Fourth Circuit has applied the "actual evidence" test in double jeopardy cases involving multiple prosecutions. However, because of its inadequacies, a number of circuits have modified their application of the Blcokburger Rule to conspiracies raising double jeopardy issues. See, e.g., United States v. Tercero, 580 F.2d 312 (8th Cir. 1978) "totality of circumstances"; Pandelli v. United States, 635 F.2d 533 (6th Cir. 1980) "modified Blockburger"; and United States v. Bendis, 681 F.2d 561 (9th Cir. 1982) "factor analysis". Although the

approaches taken by the circuits vary in name they essentially involve looking beyond the simplistic results derived from applying the Blockburger Rule and take into account the background and circumstances of a conspiracy or criminal transaction to determine if double jeopardy will be violated by multiple prosecutions of the individuals involved. Although these modified Blockburger tests have only been applied to the conspiracy charges in multiple prosecutions, they point out the need for this Court to address the inadequacy of the Blockburger Rule in cases involving multiple prosecutions of offenses arising in a single course of criminal activity.

IV. IN VIOLATION OF ITS OWN POLICY, THE PETITE POLICY, THE GOVERNMENT HAS SOUGHT TO PROSECUTE PETITIONER IN MULTIPLE TRIALS FOR OFFENSES ARISING FROM THE SAME CRIMINAL TRANSACTION.

In terms of its own policy---the Petite policy, Petite v. United States, 361, U.S. 529 (1960), and the double

jeopardy considerations the policy is intended to further, Rinaldi v. United States, 434 U.S. 22 (1977), the Government should be required to demonstrate a compelling reason for subjecting Petitioner to multiple trials when it fails to join at one trial all of the statutory violations growing out of a single course of criminal activity. Protection against unnecessary prosecutions is the very essence of the double jeopardy clause. The major rationale underlying the clause is that the State, with all its resources and power should not be allowed to subject an individual to the embarrassment, expense and ordeal of repeatedly defending against attempts to convict him for an offense. Green v. United States, 355 U.S. 184 (1975). Double jeopardy protection against multiple prosecutions is recognition of the reality that the power to prosecute involves the power to punish. Breed v. Jones, 421 U.S. 519 (1975). Allowing the Government to repeatedly try an individual for the same conduct allows the Government to punish without convicting. Unless this Court acts to ensure double jeopardy protection in circumstances such

as those presented in Petitioner's case, the discretion to determine how many trials is too many, and the power to give meaning to the double jeopardy clause will reside not in the judiciary, but in the offices of the United States Attorney and the various State prosecutors. The proliferation of criminal statutes and the legislative tendency to divide the phases of a criminal transaction into numerous statutory violations provides prosecutors with the unreviewable power to determine how many times a criminal defendant may be tried for the same criminal conduct. Such circumstances create the very danger of prosecutorial abuse that the double jeopardy clause is intended to preclude.

CONCLUSION

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment and opinion.

Respectfully submitted,

STEVE ORR
ORR & DAVIS
812 San Antonio Street
Suite 211
Austin, Texas 78701
512/474-5791

ATTORNEY OF RECORD
FOR PETITIONER
BILLY JOE NICHOLS

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing instrument have been served on Hon. Rex. E. Lee, The Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530 and three true and correct copies to Mr. Warren Montgomery, Asst. U. S. Attorney, Hale Boggs Bldg., 500 Camp Street, New Orleans, Louisiana 80130 by United States Mail, postage pre-paid on the day of December, 1984.

.....

STEVE ORR

APPENDIX A

UNITED STATES of America

Plantiff-Appellee,

v.

Billy Joe NICHOLS,

Defendant-Appellant.

No. 83-3511

United States Court of Appeals,

Fifth Circuit.

Sept. 17, 1984.

Defendant appealed from a ruling of the United States District Court for the Eastern District of Louisiana, Peter Beer, J., which rejected his pleas of double jeopardy. The Court of Appeals, Politz, Circuit Judge, held that: (1) defendant, who was either at the controls or was scheduled to be pilot of contraband-carrying aircraft in three completed and one planned flight from Colombia into United States, participated in a single conspiracy to commit multiple violations of the drug control laws, and (2) convictions of conspiracy to import cocaine and conspiracy to possess with intent to distribute cocaine did not

bar, on double jeopardy grounds, pending prosecution for the substantive offenses of importing and possessing cocaine with intent to distribute.

Affirmed in part and reversed in part.

1. Criminal Law 330

When a defendant comes forward with a prima facie nonfrivolous double jeopardy claim, burden of establishing that the indictments charged separate crimes is most equitably placed on government. U.S.C.A. Const. Amend. 5.

2. Criminal Law 161

Double jeopardy bar protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense. U.S.C.A. Const. Amend. 5.

3. Conspiracy 23

Commission of crimes at different times does not necessarily prove that the crimes were carried out by

different conspiracies; a conspiracy is an unlawful agreement and if the same unlawful agreement has as its object the commission of crimes on different occasions, there is still but one conspiracy.

4. Conspiracy 23

There are five elements which are keys to determination whether there was more than one agreement which might be separately charged: (1) time, (2) persons acting as coconspirators, (3) statutory offenses charged in the indictments; (4) overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

5. Conspiracy 23

Defendant who was either at the controls or was scheduled to be pilot of contraband-carrying aircraft in three completed and one planned flight from Colombia into United States, participated in a single conspiracy to

commit multiple violations of the drug control laws. Comprehensive Drug Abuse Prevention and Control Act of 1970. §§401(a)(1), 406, 1002, 1013, 21 U.S.C.A.; §§841(a)(1), 846, 952, 963; 18 U.S.C.A. § 2; U.S.C.A. Const. Amend. 5.

6. Criminal Law 200(6)

Substantive charges may be brought after successful completion of conspiracy charges involving those substantive offenses.

7. Criminal Law 200(6)

Convictions of conspiracy to import cocaine and conspiracy to possess with intent to distribute cocaine did not bar, on double jeopardy grounds, pending prosecution for the substantive offenses of importing and possessing cocaine with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1002, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 952, 963; 18 U.S.C.A. §; U.S.C.A. Const. Amend. 5.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, POLITZ and RANDALL, Circuit Judges.

POLITZ, Circuit Judge:

The appeal of Billie Joe Nichols poses two double jeopardy inquiries: (1) do prior convictions of conspiracy to import cocaine, 21 U.S.C. §§ 962, 952, and conspiracy to possess with intent to distribute cocaine, 21 U.S.C. §§ 846, 841(a)(1), based upon one shipment of cocaine, bar the pending prosecution for the substantive offenses of importing and possessing cocaine with intent to distribute, 21 U.S.C. §§ 841(a)(1), 846; 18 U.S.C. §2; and (2) do those convictions bar the prosecution of charges of conspiracy to import cocaine and of conspiracy to possess with intent to distribute cocaine based on earlier shipments? The district court rejected both pleas of double jeopardy.

Concluding that the conspiracy convictions present no bar to trial of the charges on the substantive violations, we affirm that part of the trial court's jeopardy ruling. But concluding that the record reflects one on-going conspiracy, we reverse and direct dismissal of the pending conspiracy charges.

Facts and Procedural Background

This case involves the smuggling of cocaine by use of aircraft, from Colombia into the United States. The four indictments handed up involve four flights, three completed and one planned but interrupted before completion. In each, Nichols was either at the controls or was scheduled to be the pilot of the contraband-carrying aircraft. Our ruling today turns on a close look at the four smuggling incidents, including an examination of the characters, their modus operandi, and all of the relevant parts of the operation.

The mise-en scene begins in 1980 when Claude Griffin began smuggling and selling marijuana. By 1982, Griffin and Fernando Lopez, a Colombian with shipping ties in New Orleans, conspired to smuggle cocaine from Colombia by air into Louisiana. Lopez, who had contacts in Colombia and claimed a ready source of supply, assumed primary control of the operation. Griffin was second in command. Each contacted and engaged other persons to perform various functions. According to Griffin, who turned state's evidence, he and Lopez intended to continue the operation for an indefinite period, smuggling as much as they could.

Griffin and Lopez hired James Edward Eakes and Robert L. Ross to handle the actual transportation. Eakes and Ross employed Nichols to pilot their aircraft. Each flight was to originate in the United States, fly to Colombia for loading, refuel in Belize, and return to a remote strip near Raceland, Louisiana, a small town in the South Louisiana bayou country.

The first trip was planned in June of 1982 and brought to fruition in July 1982. Lopez and Griffin were at the center of planning for this trip, as they were for all trips. Eakes and Ross, hired to do the actual transporting, hired Nichols to fly their aircraft, a Piper Aztec. Lopez made arrangements with an unidentified source in Colombia. Nichols flew the Piper Aztec and smuggled 100 kilograms of cocaine from Colombia to Raceland. This trip is the basis for indictment number CR-83-305 returned June 24, 1983.

As the July trip was being finalized, Lopez and Griffin planned the second trip. Lopez made arrangements with a new supplier, the Rodriguez brothers. Eakes and Ross were hired and they again put Nichols in the cockpit. In August of 1982, Nichols ferried 250 kilograms of cocaine from Colombia to Raceland in the Piper Aztec. After this flight, Nichols met with Griffin, Eakes, Ross, and Thomas Paul Gray. During the course of their discussions over what appeared to be too many drinks, a dispute over

money arose and Griffin, Eakes, and Ross had a "falling out." The August 1982 trip is the foundation for indictment number CR-83-306 returned June 24, 1983.

Following the Griffin/Eakes/Rodd difficulty in September 1982, Griffin reached an agreement with Nichols and E. Lee Morris to fly the next load, which was then being planned for October 1982. The suppliers for that transaction were again the Rodriguez family; the origination, refueling and destination points were the same; and Nichols was to be the pilot. A different aircraft was used. That aircraft, a Bonanza, developed mechanical trouble, and Nichols was grounded in Belize. Their hand forced, Griffin and Lopez made arrangements with Eakes and Ross to transport the cocaine from Colombia to Louisiana. They did so in their Piper Aztec, picking up 250 kilograms of cocaine. Insofar as this record reflects, Eakes, Ross, and their plane vanished. The October 1982 flight, the third trip, referred to in the evidence as the "rip load." It serves as the

predicate for indictment number CR-83-168, returned July 8, 1983. Although indicted for his participation in this trip, Nichols has not yet been brought to trial on these charges, and they are not a part of this appeal.

As the October 1982 trip began, the planning for the fourth trip was already underway. A new conspirator, Dr. Isaac H. Saltz (referred to in the stipulation and in briefs as Harry) came on stage. The record is unclear as to the full extent of Saltz's role, but it does appear that he was to help Lopez and Griffin with the financing for the acquisition of a Piper Navaho aircraft for use in the continuing smuggling operations. The Eakes-Ross aircraft was not available, nor was the Bonanza. An aircraft was essential. Otherwise, the post-October 1982 trips were to involve the securing of cocaine from the Rodriguez brothers in Colombia, refueling in Belize, and the landing and offloading at the Raceland strip. Nichols was to be the pilot. The fourth and any additional loads were aborted. No more flights were

made. Fearing discovery, indeed the operation was under surveillance, Griffin fled to Honduras and began negotiations which led to a plea bargain with the government. In return for his cooperation, Griffin was not indicted for the first two loads. The planning for the fourth and subsequent trips resulted in indictment CR-83-166, returned March 25, 1983. After a trial lasting several days, on August 5, 1983, Nichols was found guilty of conspiracy to import cocaine and conspiracy to possess with intent to distribute cocaine. He was sentenced to concurrent seven and one-half year terms.

Indictment CR-83-305, based on the July 1982 trip, named Nichols, Eakes, Ross, and Lopez, charging conspiracy to import and conspiracy to possess with intent to distribute 100 kilograms of cocaine, as well as with the substantive counts of importation and possession with intent to distribute. Each of the four counts of the indictment begins with the words: "Beginning on or about June

1, 1982, and continuing thereafter up to and including the date of the filing of this indictment (June 24, 1983)..."

Indictment CR-83-306, based on the August 1982 shipment, likewise contains four counts, conspiracy to import, conspiracy to possess with intent to distribute, and the substantive counts of importing and possessing with intent. This indictment names the four defendants in CR-83-305 and adds another, Bryon Abshire, who helped with unloading. Each count of this indictment refers to 250 kilograms of cocaine, and each count begins with the identical introductory language as that used in CR-83-305 handed up that same day.

Indictment CR-83-168, the indictment growing out of the "rip load," names the same five and adds Griffin, Wanda Colston, Gray and Morris. That indictment charges conspiracy to attempt to import and to import, conspiracy to attempt to possess and to possess with intent to distribute, and it charges attempt to import. The posture of

this appeal is such that no issue in CR-83-168 is now directly before the court although obviously they are indirectly involved.

Indictment CR-83-166, was returned on March 25, 1983, charging one count of conspiracy to import cocaine and one count of conspiracy to possess with intent to distribute cocaine. Names as co-conspirators were Griffin, Lopez, Nichols, Morris, Gray, Saltz, Claude Griffin II, and Henry Polakow. As noted, Nichols was found guilty of both conspiracy counts. Each count of that indictment begins: "Beginning on or about October 1, 1982, and continuing thereafter until the date of the filing of this indictment..."

The government takes the position that each trip involved separate, discrete criminal acts, justifying separate conspiracy and substantive counts. The defendant-appellant argues that there was only one conspiracy, encompassing a series of criminal acts. It is Nichols' position that the

government may not divide that single conspiracy into multiple separate conspiracies, geared to each substantive offense. Nichols also argues that his conviction on the conspiracy charges bars any subsequent trial on underlying substantive counts. We are persuaded by Nichols' conspiracy argument but reject his argument as to the substantive counts.

Analysis

(1) At the threshold, we note that when a defendant comes forward with a prima facie nonfrivolous double jeopardy claim, "the burden of establishing that the indictments charge separate crimes is most equitably placed on the government..." *United States v. Stricklin*, 591 F2.d 1112, 1118 (5th Cir. 1979). Nichols has made such a showing, and the government is obliged to establish separate conspiracies by a preponderance of the evidence. That burden has not been met.

(2) The double jeopardy clause of the fifth amendment guarantees that the government, "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a confining state of anxiety and insecurity..." *Green v. United States*, 355 U.S. 184, 187, 78 St.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Specifically, the double jeopardy bar provides three categories of protection:

> (It) protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165, 97 S.CT. 221, 225, 53 L.Ed.2d 187 (1977) (*quoting North Carolina v. Pearce*, 395

U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). *See United States v. Kalish*, 734 F.2d 194 (5th Cir. 1984).

In the case at bar, Nichols invokes the second measure of protection; he seeks to avoid a second prosecution after he has been convicted. We must determine whether the conduct described in the multiple indictments, as outlined above, constituted a single conspiracy or multiple, seriatim conspiracies.

(3.4) As we stated in *United States v. Kalish*, 690 F.2d 1144, 1151 (5th Cir. 1982):

> The commission of crimes at different times does not necessarily prove that the crimes were carried out by different conspiracies. A conspiracy is an unlawful agreement; if the same unlawful agreement has as its object the commission of crimes on different occasions, there is still but one conspiracy.

Nichols' claim that his involvement in one conspiracy has been severed improperly into several parts must be examined in light of our holding in *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978), in which we focused on five elements as the keys to the determination whether there was more than one agreement which might be separately charged:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

We examine these factors in turn.

(5) 1. *Time.* The record before us clearly reflects that from June 1982 up through the interrupted fourth load in November 1982, Griffin and Lopez had an on-going cocaine smuggling operation which they intended to continue indefinitely. It was their intent to bring in loads of contraband with regularity, monthly and even more frequently if possible. The actual flights by Nichols were only a few weeks apart and as each trip was placed in motion, the planning for the next trip was already underway.

2. *Personnel.* Lopez was the leader; Griffin was second in command. These two were central to all activities. Nichols was involved in all four incidents. Eakes and Ross were involved in all until their "rip load" and disappearance. The suppliers after the first load were the Rodriguez brothers. other players moved onstage and off, such as Abshire who helped off-load the second load and Morris who was to help with the piloting after Eakes and Ross were shunted aside. When financing for a replacement aircraft became

necessary, Saltz came on the scene. The government did not establish the particulars of his participation or that of the others charged in the indictment underlying Nichols' conviction. We are not persuaded that Saltz's emergence as a participant in the fourth incident metamorphosed the Lopez-Griffin conspiracy to import and to possess with intent to distribute into separate, discrete constpiracies. Whether one uses similes of wheels, hubs, or spokes, the result should be same. A mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will not, alone, suffice to create multiple conspiracies. *See United States v. Kalish,* 690 F.2d 1144; *United States v. Scott,* 555 F.2d 522 (5th Cir. 1977).

3. *Statutory offense charged.* Nichols was convicted of violating the very statutes he is now charged with violating.

4. *Acts charged—acts proved at trial.* Under drug conspiracy statutes no overt act need be pleaded and proven.

However, at Nichols' trial for the fourth incident, the government offered evidence of the entire Lopez-Griffin operation. Evidence of the trips which form the basis of the other three indictments was presented to the jury under Fed. R. Evid. 404(b). The government was allowed to offer the evidence to prove the existence of a plan and to explain the pending conspiracy charge. Nichols argues that this evidence tends to prove the existence of one conspiracy. We agree.

5. *Places.* The geography is identical in all instances: New Orleans and Raceland, Louisiana, Belize, and Colombia.

As we evaluate the facts contained in this record, in light of the *Marable* standard, we conclude that Nichols participated in a single conspiracy to commit multiple violations of the drug control law. That conspiracy (actually conspiracies since each statute—importation and posses-

sion with intent to distribute—may be the subject of a separate conspiracy charge), had an essential continuity in personnel, a consistency in method, an identical base of operation, and a singleness of unwavering purpose. In this respect, this case closely resembles *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978), in which we found the double jeopardy clause implicated because:

> (T)he participants shared a continuing, common goal of buying and selling (drugs) for profit; the operations of the conspiracy followed an unbroken and repetitive pattern; and the case of conspirators remained much the same.

(6,7) Nichols' second claim is without merit. He insists that the government should be compelled to bring all of the charges arising out of the Lopez-Griffin smuggling operation in one proceeding. Nichols suggests that the double jeopardy clause prohibits any prosecurion on substantive

charges after a prosecution for conspiracy to commit those substantive offenses. That is not the law in this circuit. Substantive charges may be brought after successful completion of conspiracy charges involving those substantive offenses. *United States v. Kalish*, 734 F.2d 194.

In *Kalish*, the defendant was prosecuted and convicted for his participation in a conspiracy to import and distribute marihuana. When the government subsequently attempted to prosecute for the underlying substantive offenses, Kalish claimed that the second prosecution was barred by the double jeopardy clause. We disagreed, holding that the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.CT.180, 76 L.Ed.306 (1932), is the standard by which we determine whether two offenses are the same for double jeopardy purposes. 734 F.2d at 196-197. *See also, United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), *panel opinion adopted in relevant part and remanded*, 611 F.2d 985 (5th Cir.) (en banc), *cert. denied*,

447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980). The *Blockburger* test provides that:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304, 52 S. Ct. at 182. Under our application of *Blockburger's* teachings, the offenses of conspiracy to commit a crime and the crime itself are separate offenses. Each requires proof of a fact not required for the other. 734 F.2d at 198. *See also Iannelli v. United States,* 420 U.D. 770, 785-86 n. 17, 95 S.Ct. 1284, 1293-94 n. 17, 43 L.Ed.2d 616 (1975). Nichols' conspiracy convictions provide no double jeopardy obstacle to prosecution of the pending substantive charges. However, the pending conspiracy convictions are barred by the double jeopardy clause.

AFFIRMED in part; REVERSED in part.

APPENDIX B

21 USC §952. Importation of controlled substances

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, - - -

APPENDIX C

21 USC §963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX D

21 USC §841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally - - -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

APPENDIX E

21 USC §846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Oct. 27, 1970, P.L. 91-513, Title II, Part D, §406, 84 Stat. 1265.)